PUBLIC PROSECUTOR

v.

JANGGU AWING

HIGH COURT BORNEO, TAWAU
ABU MANSOR ALI J
[CRIMINAL TRIAL NO. 8 OF 1984]
15 DECEMBER 1984

CRIMINAL LAW AND PROCEDURE: *Accused found in possesion of dangerous drugs - Defence that the drugs belonged to two other persons - Whether the non-calling of witnesses influenced the Court in its decision.*

The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s. 39B(2) of the same Act.

The police found the accused to be in possession of 414.3 grammes of Cannabis within a bag he was carrying.

The accused gave evidence on oath and in his testimony stated that the Cannabis belonged to two persons by the name of Jak and Halik. The accused called a witness Nasir bin Jamal who said that he was the one who carried the bag in which the Cannabis was found.

The accused however did not call Jak and Halik even though they were traceable and at one stage were just outside the Court room.

Held:

[1] As a finding of fact from the prosecution evidence the Court found the accused to be in possession of the offending Cannabis.

[2] The allegation by the accused that the Cannabis belonged to Jak and Halik did not alter a finding of guilt that the accused was trafficking as it is an offence even though he carried it for someone else.

[3] The Court did not hold any adverse inference under s. 114(g) of the Evidence Act against the prosecution for not having called Jak and Halik and the non-calling of these witnesses in no way influenced the Court in its decision.

[Accused convicted and sentenced to death.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(1)(a), 39B(2)
Evidence Act 1950, s. 114illus.(g)

For the Public Prosecutor - Abdul Malik Ishak, SFC
For the accused - Ting E. Hang (assigned)

JUDGMENT

Abu Mansor Ali J:

The accused was convicted and sentenced to death at Tawau High Court, Sabah, on 15 December 1984, on a charge of trafficking as follows:

That you on 18 November 1983 at about 6.45 a.m. at Pengkalan Kunak, Kunak, in the District of Lahad Datu, in the State of Sabah, did traffic in dangerous drugs, to wit, 414.3 grammes of cannabis on your own behalf and that you have thereby contravened s. 39B (1) (a) of the Dangerous Drugs Act, 1952 (Revised 1980), Act 234, and punishable under s. 39B (2) of the said Act.

The Prosecution called 10 witnesses and at the end of which I found as a fact that possession by the accused of the 414.3 grammes of the offending cannabis was proved. This was particularly through the evidence of prosecution witness, Sub. Insp. Rashidin Badardin (PW6), PC Malcolm a/k Maing (PW7) and PC Richard Laman (PW8). PW6 stated that on 18 November 1983 at 5.30 a.m. on information received, he proceeded to Pengkalan Kunak in civilian clothes but armed. He met two Police Field Force personnel on duty there, PW7 and PW8, who were then on special duty at the Kunak jetty. PW6 briefed these two police personnel, PW7 and PW8, to the effect that two male suspects would pass between a coffee shop and the fish market. One of the two was bearded wearing a long sleeved light blue shirt. PW6 said that the said one with the long sleeved shirt would be carrying a plastic bag suspected to be containing "ganja". Apart from this, PW6 also gave the description of the other person who was younger and he would be carrying a travelling bag of clothes. PW6 then asked PW7 and PW8 to take ambush positions in the middle of stalls which had no walls. PW6 positioned himself near the fish market with PW7 on his right and PW8 on his left. They were about 20 feet from one another and within sight. According to PW6 from information received the two suspects would be coming from the direction of the kampong houses. At about 6.45 a.m. on 18 November 1983 as expected the two persons appeared walking one behind the other. They were walking between the fish market and the said coffee shop. PW6 saw the bearded man was wearing light blue shirt carrying a Plastic bag behind his back (demonstrated). The person behind him was carrying a travelling bag in his left hand.

Upon seeing this, PW6 then signalled to PW7 and PW8 by pointing his fingers, towards them. When PW6 followed PW7 from behind PW7 and PW8 closed in. While so following PW6 saw the bearded man was still carrying the plastic bag; PW6 saw PW7 held the bearded man's right hand from the back and brought him to a squatting position (demonstrated) PW7 took the plastic bag (P12 identified) and handed it to PW6. PW6 took the plastic bag, P12, containing something brownish and greenish wrapped up in a transparent plastic tied with a string. He believed the article to be "ganja" (P9). There was no need for him to open as the wrapper was transparent.

After taking the plastic bag from PW7, PW6 told the bearded man he was carrying ganja and according to PW6 the man was shivering, looked pale, and he was crying. The man told PW6 it did not belong to him but he was asked to carry it. Whereupon PW6 told him that as he was found carrying it he told him it therefore belonged to him. The bearded man was the accused in the dock, and PW7 then tied the accused's hand with Manila hemp. At the same time PW6 also saw PW8 had arrested the other younger person (identified as Nasir bin Jamal, DW6) who was carrying a travelling bag (P13) containing clothing (P14).

After the arrest PW6 took the accused and Nasir (DW6) together with the Exhibits P9, P12, P13 and P14 to the Kunak Police Station. He handed the accused and the exhibits to Area Inspector, Abu Bakar bin Yaacob (PW5) and he lodged a police report (P16). PW6 was also present when PW5 weighed the ganja. Inclusive of wrapper it was approximately 650 grammes. On the same day at 9.15 a.m. he assisted the Investigation Officer, Insp. Ng Loi (PW4), to draw a sketch plan (P11) of place of arrest.

The Court carefully scrutinised PW6's evidence and took great care to project it against the evidence of PW7 and PW8 in respect of arrest of the accused and in respect of his possession of the offending exhibits and it finds the evidence of PW6 tallied in great many details with the evidence of PW7 and PW8 not that PW6's evidence in law needed any corroboration. PW6 also impressed me as a witness of truth who took great care with his work, who has been long in the Force, and there was no reason for him to lie. He gave his evidence calmly and with no exaggeration. The Court believed PW6, PW7 and PW8 and accepted their evidence and held that the fact of possession of P9 by the accused was proved beyond reasonable doubt.

The Prosecution called Encik Khalid Safan (PW1), the chemist, to prove that the Exhibit P9 was in fact cannabis. The Court heard PW1's usual primary testimonial evidence showing he was an expert chemist and had given evidence in many Courts. The Court accepted he was an expert in his field having the required qualification and had so given such expert evidence in Court before. PW1 said on 28 November 1983 he received a packet identified as P3. In P3 was a red box and in the box was a plastic bag PX1. PX1 contained another plastic bag containing 414.3 grammes of vegetable matter, P9. PW1 analysed the vegetable matter and found it positively to be cannabis. In arriving at that conclusion PW1 duly explained he employed three tests and they all positively indicated that P9 was cannabis. The defence did not at all challenge his evidence it was cannabis. The Court accepted his evidence that P9 was in fact cannabis.

The Court was also careful that the chain of evidence regarding custody of P9 was not broken until it reached the Court. After hearing the submissions of both counsels the Court made a finding that it was satisfied that the Prosecution had made out *a prima facie* case against the accused which, if unrebutted, would have warranted a conviction. Consequently, the Court called the accused to his defence. The accused elected to give evidence on oath. The accused's defence was a mere denial.

The accused said on the day that he was arrested he boarded a ship from Bongoa in the Philippines to Sitangkai District. From there he took another pump boat to Sabah. The boat belonged to a person he knows by the name only as Jak. For the trip Jak charged him 130 pesos for each person. There were many passengers and Nasir bin Jamal (DW6) was one of them. He only knew DW6 when he invited him to have "nasi" with him not before that.

He said on this trip he brought several things which he tendered as 2 pairs of trousers (D15-AB), 3 shirts (D16-ABC), 1 cooking pot (D3), and 5 plastic cups (D4-A/E), 3 glasses (D5-A/C), 3 plates (D6-A/C), 1 plastic (D7) and 2 spoons (D8), 1 torchlight (D9), a belt (D10), a bedspread (D11) and a pair of socks (D12). They were all kept inside a plastic sack, a plain bag with no drawing on it (D13). All his clothings were in the travelling bag (D14) and the rest in a plastic sack (D13).

He said he arrived in Kunak jetty a little past 5 a.m. He only knew he arrived when he reached the jetty. All passengers disembarked and he said he left the boat carrying his things. He was asked by Jak to go to a house owned by a certain person called Halik mentioned by one of the passengers. He left his "barang" outside a room. He said he was asked to go there to avoid police detection as he had no travelling documents. He stayed a while and he was asked by this Halik and Jak to find other accommodation and he left taking his belonging. He placed the plastic, D13, under his right arm and carried the travelling bag in his left arm.

He said when he reached the fish market he was arrested by the police. He was walking third with Jak in front and Nasir bin Jamal (DW6) second and Halik was last. He and Nasir were arrested while the other two fled from the scene. The accused said subsequently Jak

and Halik were arrested as they were in a cell with him in Lahad Datu Police Station. Halik was released by the Police according to accused. He did not see Jak after his release but accused said last Tuesday (the first day other hearing of this trial) he saw Halik outside the Court. His warders, Sariman bin Dollah (DW3) and Nayar Tassim (DW4) were there when he saw Jak and Halik. They were standing near the corner outside the Court room. This was the first day of trial and the accused said when he was taken inside the Court room he saw them walking off. He did not know why they left. He said Nasir pointed to the two warders that the Cannabis belonged to Halik and Jak. He did tell his counsel about these two when he visited him in the prison.

The accused said he worked as a farmer in the Philippines and in Sabah he was a cocoa insecticide sprayer in Sepong Estate. When he was arrested he just returned from Philippines after his 20 days's leave to see his wife giving birth. He was returning to resume his duty in the said estate.

He denied knowledge of P9 in P12 and he denied he carried the bag, P12, at the time of arrest but he did carry D13 and D14.

The accused called DW3 and DW4 to prove the presence of Jak and Halik who were then outside the Court. Apart from them, he called Nasir bin Jamal, DW6 who said that it was he who carried P12 in which P9 was found. DW6 substantially corroborated the accused regarding the events leading to their arrest except he said P12 in which P9 was found was carried by him and not the accused. The Court had the impression DW6's evidence was a vain last attempt by DW6 to save his friend.

At the end of the defence evidence the Court considered whether the defence evidence had thrown a reasonable doubt on the prosecution's case. If it had the accused was entitled to an acquittal.

Before calling the accused to his defence I have carefully scrutinised and examined the evidence of PW6 and I took great pain to project PW6's evidence against the evidence of PW7 and PW8 and the Court's finding through the evidence of these three witnesses was there was no doubt whatsoever in the Court's mind that it was the accused that carried P13 containing P9 which contained cannabis. After hearing the defence evidence particularly that of the accused, the Court held that his evidence was a mere denial that he carried P12 and DW6's evidence was nothing more than an attempt to save the accused by saying it was he who carried P12. His evidence did not in any way alter the Court's finding of fact that the accused carried P12. The allegation by the accused that P9 belonged to Halik and Jak did not in the Court's view go anywhere to alter the finding of guilt of the accused for the offence of trafficking (even if true though not admitted) is still an offence even though he carried it for someone else. As a side issue it is well worth noting when PW6, PW7 and PW8 gave evidence in Court the things alleged to belong to the defence were with him in Court. They were never put to PW6, PW7 and PW8 in cross-examination that the accused carried these belongings that he said he brought at the time of his arrest though the "barang-barang" were just behind him at the dock. As for the calling of Jak and Halik, I am satisfied no statements were taken from them and in passing only it was for the defence to subpoena them if they were wanted to give evidence on his behalf although by this no adverse inference whatsoever is drawn against the defence by their failure to do so. In saying this the Court is aware the no of any witness should not be made a subject of any comment by the Court. The non-calling of this witness in no way influences the Court in its decision to find the accused guilty. The most telling of the evidence against the accused is that the accused carried the offending Exhibit P9 containing the cannabis and he knew the content thereof by shivering and crying according to PW6.

Last but not least I wish to revert to this question of the non-calling of Jak or Halik by the defence. Like all trial cases in preliminary inquiries the prosecution and defence witnesses are all sent to the High Court and in this case it appeared to me the names of Jak and Halik were also sent up by the police but they were never intended to be used by the prosecution and neither did defence made any attempt to subpoena or use them. The prosecution never took any statement from them. If the defence wanted them it was the defence who must subopena them and after all there is evidence that the accused did inform the defence counsel of their presence when the defence counsel visited him in the prison. In view of this, I do not hold any adverse inference under s. 114(g) of the evidence against the prosecution for not having called them. In any case it is settled that calling of witnesses is well within the prosecution's sole of discretion.

At the end of the prosecution's case, I held that the defence evidence had not raised a reasonable doubt on the case for the prosecution and I found him guilty as charged of trafficking in cannabis which was more than 200 grammes (414.3 grammes).

As regards sentence I passed the only sentence that I could pass under the law which was that the accused be hanged until death.

Also found at [1985] 1 CLJ 321